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No. 97-464

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

CPC INTERNATIONAL INC., PETITIONER

v.

AEROJET-GENERAL CORPORATION,
ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE CONDITIONAL CROSS-PETITIONER

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REPLY BRIEF FOR THE CONDITIONAL CROSS-PETITIONER

The responsive briefs amply demonstrate that the petitions in Nos. 97-296 and 97-454 should be denied. Moreover, the Brief for the United States suggests that, if the petitions were granted, the case might well be dismissed either as improvidently granted or as moot. Neither of the briefs advances any sound reason to deny the conditional cross-petition.

1. In its brief, the United States identifies yet another reason why this case presents an especially poor candidate for this Court's attention. The United States raises the possibility (Br. 9 n.4) that the action — or significant parts of it — may be settled before this Court could resolve the questions presented.[1] In so many words, the United States concedes that this Court's resources may well be misdirected if this case comes before it.

Moreover, the United States less than three weeks ago filed a Brief in Opposition to the petition in No. 97-241 — a petition that asserts a conflict among the circuits with respect to the more commonly recurring issue of successor liability under CERCLA — that identifies an additional reason why the petitions in this case "have overstated the need for immediate resolution of the question." No. 97-241, U.S. Br. in Opp. 18. In that brief, the United States argues that a grant of certiorari is premature because the courts of appeals have not yet had an opportunity to consider whether court-made federal rules of liability under CERCLA are appropriate in light of this Court's instructions to the contrary in several recent cases. See *id.* at 18-19 (citing *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997), and

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[1] Although the United States hints only at the possibility of a sweetheart settlement among the government petitioners and MDNR's indemnitee, Aerojet, we note that the long history of actual settlement discussions in this case has included CPC. To the extent that the United States is trying to shelter MDNR from the potential effects of the petition of the United States, such machinations reinforce the inappropriateness of this case for further review.

O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994)). See also *United States* v. *Texas*, 507 U.S. 529, 534 (1993); CPC Br. in Opp. 15-18.

The United States' argument in No. 97-241 flatly contradicts the position it asserts in seeking certiorari here. Since this Court in *Atherton*, *O'Melveny*, and *Texas* clarified the strong presumption against judicial displacement of state-law liability rules in the absence of a clear statutory command, *no* court of appeals has affirmed a final judgment of liability under CERCLA against a parent corporation based on the *ad hoc* federal standard advanced by petitioners. The few courts that have stated federal standards in interlocutory decisions or in dicta have not even acknowledged this Court's decisions in *Atherton*, *O'Melveny*, or *Texas*. The United States cannot have it both ways: as it correctly explains in No. 97-241, this Court should permit the courts of appeals to apply this Court's recent statement of the controlling jurisprudence to CERCLA "operator" liability before deciding whether it must itself address the issue.

The brief for Aerojet-General Corporation and its subsidiaries (collectively "Aerojet") additionally confirms that the issue presented in the petitions, concededly of sporadic significance and declining in importance, does not warrant further review. As Aerojet notes, all of the courts of appeals agree that a parent corporation or other shareholder may be liable as an "operator" either through direct activity at a "facility" or as a result of corporate veil-piercing. As Aerojet's analysis confirms, no court of appeals has held a parent corporation liable as an operator of its subsidiary's facility based on an intracorporate relationship resembling that of CPC and Ott II.

Although no further review of the question presented is warranted at all, to grant review in a convoluted and fact-specific case of uncertain status would be especially imprudent in light of the clear opportunity to review identical, but broader issues in a simpler case arising from the same court. The Sixth Circuit now has decided *Donahey* v. *Bogle*, No. 92-1128, 1997

WL 710017 (Nov. 17, 1997), which was argued *en banc* the same day as the present case. The analysis of the Sixth Circuit in *Donahey* was identical to its analysis here, the facts are essentially undisputed, the alignment of parties is simpler, and both parties brought that case before this Court at an earlier stage. *Donahey* v. *Livingstone*, No. 93-646, cert. denied, 510 U.S. 1024 (1993); *Livingstone* v. *Donahey*, No. 93-428, cert. granted, vacated and remanded, 512 U.S. 1201 (1994).

The defendant in *Donahey* not only was sole shareholder of the "operator" corporation, but also was its treasurer and chairman of its board of directors. 1997 WL 710017, at *1. Review of *Donahey* thus would allow this Court to address not only shareholder liability, but also the personal liability of officers and directors of "operators." If there is any reason to review the Sixth Circuit's handling of "operator" liability in light of continuing congressional interest in providing legislative solutions for perceived failures in CERCLA, see *Break in Superfund Stalemate May Lead to Action Next Year*, CQ MONITOR, Nov. 14, 1997, at 8 (reporting "comprehensive bipartisan measure to overhaul" CERCLA), *Donahey* would provide a far more appropriate vehicle than this case.

2. Aerojet also advances two reasons why, it says, it should not be included as a respondent. Neither warrants consideration. First, Aerojet suggests (Br. 17) that CPC lacks "a sufficient personal stake in the outcome" of the case against Aerojet. For reasons explained in the conditional cross-petition (at 4-7), the suggestion is frivolous. Aerojet's assertion (Br. 17) that CPC has "abandon[ed]" its claim against Aerojet is simply false. Aerojet notes that the parties' contribution claims were dismissed, by stipulation and without prejudice, in the district court. As Aerojet is well aware, but as it conceals from this Court, the parties refiled their contribution claims in a separate action *in the same district court*. See *CPC International Inc.* v. *Aerojet-General Corp.*, No. 1:94-CV-432 (W.D. Mich.). Those claims include Aerojet's own contribution claim against CPC. See *id.*, Answer, Affirmative Defenses, Counterclaim and

Cross-Claim of Aerojet-General Corp. *et al.* (filed June 30, 1994).

Even within the four corners of this action, however, the imposition of joint and several liability renders CPC adverse to Aerojet. If CPC were held to be a responsible party for the Muskegon site, but Aerojet were permitted to avoid liability because this Court denied all review as to Aerojet, CPC might have to pay all response costs. If, by contrast, Aerojet also were held to be a responsible party, the total costs would be apportioned between CPC and Aerojet.

For related reasons, Aerojet's second argument for exclusion from any grant of certiorari is equally unsound. Contrary to Aerojet's assertion (Br. 12, 16-17), MDNR's obligation to indemnify Aerojet does not make Aerojet's inclusion in any prolongation of this litigation less appropriate. If CPC and Aerojet both were held responsible, the total response costs would be apportioned between CPC and Aerojet. MDNR's status as Aerojet's indemnitor is the result of MDNR's bargain under Michigan law and does not affect the calculus under CERCLA. If CPC alone were held responsible because this Court denied review, MDNR would evade its indemnity obligation and CPC would be left holding the bag. MDNR should not be permitted to orchestrate its own release from liability.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be granted if the Court grants the petition in No. 97-296.

Respectfully submitted.

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